APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 94-3328

MIDWEST MOTOR EXPRESS, INC.; MIDNITE EXPRESS, INC.; EXPRESS CARTAGE, INC.,
Appellants,

v.

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Appellee.

Appeal from the United States District Court for the District of North Dakota

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Submitted: September 14, 1995

Filed: December 4, 1995

Before WOLLMAN, JOHN R. GIBSON, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Midwest Motor Express appeals from an order transferring this case from the District of North Dakota to the

Northern District of Illinois. We affirm the order of the district court.[1]

I.

Midwest was obligated under its multiemployer collective bargaining agreement to make contributions to Central States, a pension fund. During a labor strike, Midwest ceased making pension contributions to Central States, creating concern at Central States that Midwest would withdraw and permanently cease making such contributions. If an employer withdraws from a multiemployer plan, the employer is liable to the plan for an amount known as "withdrawal liability." 29 U.S.C. § 1381(a) (1985). The parties litigated the matter of withdrawal liability, but settled the litigation before it reached any conclusion on its merits.

Some time later, the union at Midwest was decertified. This triggered Central States' belief once again that Midwest would withdraw and cease to make contributions. Central States sued Midwest in the Northern District of Illinois and sent Midwest a Notice and Demand of Withdrawal Liability as provided under the Multiemployer Pension Plan Amendments Act of 1980. In response to this notice, Midwest initiated the present action for declaratory and injunctive relief and moved to enjoin Central States from seeking remedies based on Midwest's failure to pay withdrawal liability. (It seems that the proposed injunction was an attempt to prevent Central States from moving ahead in any other forum.) Central States then moved to transfer venue to the Northern District of Illinois under 28 U.S.C. § 1404(a). A magistrate judge [2] granted the motion to transfer and dismissed the motion for injunction and the district court upheld the magistrate's de-

[1] The Honorable Patrick A. Conmy, United States District Judge for the District of North Dakota.

[2] The Honorable Dwight C.H. Kautzmann, United States Magistrate Judge for the District of North Dakota.

cision. The district court clerk's office, without waiting a reasonable period of time to give the parties an opportunity to file a notice of appeal, immediately mailed the case file to the Northern District of Illinois. The Northern District of Illinois dismissed the case after transfer on the grounds that it had no jurisdiction while this appeal was lodged in the Eighth Circuit.

II.

We initially address some jurisdictional matters. First, although we generally do not exercise jurisdiction over transfer orders, *see, e.g., United States Fire Ins. Co. v. American Family Life Assurance Co.*, 787 F.2d 438, 439 (8th Cir. 1986), we do so when the order to transfer has the effect of refusing an injunction and the motion for injunction and the order to transfer are inextricably bound up with each other. *See* 28 U.S.C. § 1292(a)(1); *Nordin v. Nutra/System, Inc.*, 897 F.2d 339, 343 (8th Cir. 1990); *Emerson Elec. Co. v. Black & Decker Mfg. Co.*, 606 F.2d 234, 237 (8th Cir. 1979). In this case, the order had the effect of refusing an injunction, and the order and the injunction sought were inextricably bound up with each other, because the injunction would have prevented Central States from proceeding in the Northern District of Illinois, and the order in fact sent the case to that district.

Second, Central States argues that this court does not have jurisdiction because the district court clerk mailed the court file to the Northern District of Illinois before the notice of appeal was filed in our court. Our circuit takes the view that the physical receipt of the file in the transferee court is the event that signals the end of jurisdiction in the transferor court. *In re Nine Mile Limited*, 673 F.2d 242, 243-244 & n. 5 (8th Cir. 1982) (per curiam). Central States argues that, under *Nine Mile*, we never acquired jurisdiction because the notice of appeal was filed after the district court lost jurisdiction of the

case. We note, however, that the physical transfer of the file was premature because it was sent in violation of *Nine Mile*'s directive to district court clerks that they wait a reasonable period before transferring case files after a transfer order is entered, 673 F.2d at 244, and also appears to have been an inadvertence since the file was mailed in violation of that clerk's office's own policy (presumably in accordance with *Nine Mile's directive*) of waiting thirty days before mailing a file pursuant to a transfer.

We question the applicability of *Nine Mile* when the clerk's physical transfer of the file was premature, mistaken, and was of no practical effect. The premature mailing in violation of *Nine Mile*'s directive renders the transfer of questionable legal effect. *Cf. Farrell v. Wyatt*, 408 F.2d 662, 664 (2d Cir. 1969) ("the question here is whether the district court had power to order the transfer; when that is the issue, we reject the argument . . . that the clerk's physical transfer of the file destroyed our jurisdiction"). The mailing also appears to have been a simple mistake, and, frankly, it seems to us odd at best that the clerk's act of mistakenly putting a case file on a mail truck bound for Montana could divest a federal circuit court of appeals of jurisdiction. The rule that jurisdiction follows the file avoids the procedural and jurisdictional snarl that would likely ensue if two courts were simultaneously working on the same case. *See* 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3846 at 358 (2d ed. 1986) (exceptions to the rule in question "create possibilities of unseemly duplication of effort, and perhaps even inter-circuit conflict, if an appeal is going forward in one circuit while the papers are lodged in a district court in another"). We need not worry about any such conflict here because the Northern District of Illinois declined jurisdiction over the transferred file.

The premature physical transfer of the file in this case was a violation of our directive in *Nine Mile*; the Illinois

court recognized the mistake and declined jurisdiction. These two facts separate our case from *Nine Mile*. To find under these circumstances that we do not have jurisdiction because the file was accidentally mailed to Illinois would elevate form over substance and serve only to delay the resolution of this appeal. We conclude that we have acquired jurisdiction.

III.

We affirm the district court and its decision to transfer this case based upon the "first-filed" rule. This rule "gives priority, for purposes of choosing among possible venues when parallel litigation has been instituted in separate courts, to the party who first establishes jurisdiction." *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993). Midwest maintains that Central States' claims were premature when filed and thus legally nonexistent, and that, as a result, the Illinois forum was not the first to acquire jurisdiction. Midwest thus asks this court to weigh the merits of the Illinois action in order to determine whether that forum has jurisdiction. But this is a non sequitur. "A court may have jurisdiction over a case even though the case is one to which there is no merit. . . . The jurisdiction of the federal courts is dependent on the subject matter of the action or the status of the parties to it; it is not dependent on the merits of the case." Charles A. Wright, *Law of Federal Courts* 31 (5th ed. 1994) (footnote omitted); *see, e.g., Venner v. Great Northern Ry. Co.*, 209 U.S. 24, 33-35 (1908). The Illinois court therefore has jurisdiction to decide the issues before it and it obtained this jurisdiction before the North Dakota court did.

Midwest also argues that "compelling circumstances" should lead us to ignore the first-filed rule, *see United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488-89 (8th Cir. 1990), but we find the proffered circumstances insufficiently compelling. Midwest again asserts that Central States' claims were pre-

mature when filed, but, if the claims are legally infirm, we trust the Illinois court to dismiss them. Midwest also alleges that Central States' complaint contained false statements of fact, and that this constitutes a compelling circumstance for ignoring the first-filed rule. If these alleged misstatements indeed exist, Midwest may move for sanctions in the Illinois court. We might have been be more favorably inclined to Midwest if it had produced evidence that Central States promised or indicated in some manner that it would not sue, that Midwest relied on this representation, and that Central States then filed a surprise complaint, *see id.* at 489, but Midwest has made no such showing and offers to make none.

Finally, the district judge suggested at the end of his opinion that he was "reasonably certain" that Illinois courts had greater expertise in pension benefit matters. Midwest argues that this comment demonstrates that the district court made its decision on improper grounds. The order, however, recited legally sufficient grounds for transfer. The comment has the quality of a mere observation or afterthought, and does not suggest to us that the district court abused its discretion in making its decision to transfer.

IV.

There remains an outstanding matter of contempt sanctions. Central States filed a motion for a preliminary injunction in the Illinois action seeking to prevent Midwest from transferring assets and to compel Midwest to pay all past-due amounts under the withdrawal liability payment schedule as well as to make future payments under that schedule. Midwest responded by applying to the Eighth Circuit for an injunction pending appeal preventing Central States from "enforcing, collecting, accepting, claiming or directly or in escrow, obtaining interim payments of alleged pension withdrawal liability from Midwest in any other forum." We granted Midwest's motion for an injunction pending appeal. Central States then modified its motion for injunction in the Illiois action

by dropping the request that Midwest pay withdrawal liability, but pushed ahead with its attempt to forbid Midwest from transferring assets. The Illinois court denied the motion and Central States sought review in the Seventh Circuit. Upon Midwest's motion, we found Central States in contempt.

We have reconsidered the order finding Central States in contempt. Our order did not specifically enjoin Central States from seeking to prevent Midwest from transferring assets. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam) (injunction must contain explicit notice of precisely what conduct is outlawed). We are of the view that Central States did not violate our injunction and therefore reverse our finding of contempt against Central States.

V.

For the foregoing reasons, we affirm. Midwest's motion for leave to supplement the record is granted. All other pending motions are denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A1-94-044

MIDWEST MOTOR EXPRESS, INC., NME, INC.,
MIDNITE EXPRESS, INC., and EXPRESS CARTAGE, INC.,
Plaintiffs,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Defendant.

MEMORANDUM AND ORDER

Plaintiffs, "Midwest", appeal Magistrate Judge Kautzmann's order transferring venue of this case to the Northern District of Illinois. Midwest appeals this order under U.S. District Court Local Rule 28.[1]

The issue before the court is whether the Magistrate Judge abused his discretion in granting Defendant Central States Pension Fund's "Central States" motion to transfer this case to Illinois.

Plaintiffs' describe their case as a constitutional challenge to the Mulitemployer Pension Plan Amendments

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[1] Presumably this appeal is brought under 28(G)(4)(a) of the Local Rule which says "[any party may appeal from a magistrate's determination of a non-dispositive matter within 10 days after being served with a copy of the magistrate's order. . ."

Act of 1980 "MPPAA" and they express their intention to "appeal, if necessary, to the Supreme Court." In North Dakota, this constitutional challenge takes the form of a declaratory action and request for an injunction.

Defendant Central States says that Midwest withdrew from the Central States Pension Fund in 1991 owing a withdrawal sum under the MPPAA and they describe their law suit as a "collection action."

Central States filed its collection action in the Eastern Division, Northern District of Illinois on April 26, 1994. Midwest filed is action seeking declaratory and injunctive relief in the Southwestern Division of the District of North Dakota on May 4, 1994.

Midwest advances several arguments as to why they believe the Magistrate's transfer was clearly erroneous and should be reversed. Midwest says the Illinois action is not really the "first filed" action because they have filed a motion to dismiss which has yet to be ruled upon and they might win. They say the Central States Illinois action was premature, a false pleading and is reflective of bad conduct which should not be countenanced. Midwest also says the North Dakota action is "further along" than is the Illinois action.

Central States counters by saying the two actions are the same and Midwest's defense on the merits in the Illinois action will raise their constitutional issues. It says the North Dakota action is not "farther along".[2] Central States also says the Illinois action was validly filed and Midwest simply lost their attempt to be the first in the court house.

The court has reviewed the pleadings which were available to the Magistrate Judge at the time of the order to transfer as well as Midwest's Brief In Support of Appeal

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[2] Each party has filed a competing motion to dismiss the action they do not perceive to be in their preferred forum and neither party has filed an answer.

of Magistrate's Memorandum and Order and Central States' Responsive Brief and is not convinced that the Magistrate Judge abused his discretion in transferring the case to Illinois.

At this stage the Illinois action is the "first filed" action. The North Dakota case is not meaningfully "further along" and the two cases involve the same issues. Moreover, the Court is reasonably certain that the Illinois court is more familiar with the "angles" and "ins and outs" of Employee Pension Fund Law.

The court declines to replace Magistrate Judge Kautzmann's concern that two courts could retain jurisdiction over the same set of facts and reach dissimilar results with Midwest's speculation that the Illinois court may grant their motion to dismiss, leaving the dispute in limbo.

Accordingly and for the reasons cited above, Midwest's appeal of Magistrate Judge Kautzmann's order of July 27, 1994 (docket #300 is denied.

SO ORDERED.

Dated this 30th day of August, 1994.

/s/ Patrick A. Conmy
PATRICK A. CONMY
District Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Case No. A1-94-44

MIDWEST MOTOR EXPRESS, INC.,
Plaintiff,

v.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSIONS FUND,
Defendant.

MEMORANDUM AND ORDER

Before the court are various motions including the defendant's motion to dismiss or change venue to the district of Illinois. For reasons stated in this opinion, the court will address that motion, and dismiss all pending motions without prejudice to allow them to be renewed in the district of Illinois.

BACKGROUND

On April 26, 1994, Central States Southeast and Southwest Areas Pensions Fund (Central States) filed an action against Midwest in the Northern District of Illinois, seeking the collection of withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) and declaratory and injunctive relief. On that same day, Central States mailed Midwest a notice and demand for payment of withdrawal liability.

On May 4, 1994, Midwest Motor Express (Midwest) filed the present action in the district of North Dakota,

requesting the court to declare the assessment of withdrawal liability on Midwest unconstitutional and void. Midwest filed an amended complaint on May 17, 1994. Midwest's complaint contained the same allegations as those contained in its defense of the Illinois lawsuit. However, in the North Dakota case, Midwest alleged constitutional and statutory defenses not raised in the Illinois lawsuit.

On May 20, 1994, in the Illinois action, Midwest filed a motion to dismiss the case, or in the alternative, transfer the case to North Dakota. No decision has been rendered on that motion by the Illinois court.

On June 1, 1994, Central States filed a motion to extend time to file the answer due June 2, 1994 in the North Dakota case. On June 10, 1994, Midwest filed a motion for default. On June 22, 1994, Central States filed a motion to dismiss or to transfer venue. On July 12, 1994, Midwest filed a motion for a temporary restraining order and motion for a preliminary injunction and also a motion for leave to file a second amended complaint. On July 26, 1994, Central States filed its response to the motion for temporary restraining order and preliminary injunction.

DISCUSSION

In its motion to transfer, Central States requests the court transfer this case to the district of Illinois according to the first filed rule. Midwest opposes the transfer, arguing that compelling circumstances demand that the second-filed North Dakota case take precedence over the first-filed Illinois case.

Generally, the first-filed rule states that in cases of concurrent jurisdiction, the district first obtaining jurisdiction over the parties should proceed to adjudicate the controversy. *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1004 (8th Cir. 1993). It

is not intended to be a rigid rule, but to be applied to best serve the interests of justice. *Id.* In the absence of compelling circumstances, the first-filed rule should apply. *Id.*

Midwest claims that because the events surrounding the withdrawal took place in North Dakota and the fact that the witnesses are located in North Dakota constitute compelling circumstances. The fact that most of the witnesses and the activities took place in North Dakota weighs in Midwest's favor. However, it also appears that the case consists of issues of law, and that no evidentiary hearings will be required. If any hearings are required, any inconvenience to the parties or witnesses does not rise to "compelling circumstances."

Midwest next argues that the case would be more swiftly resolved in this district as opposed to the Illinois courts which have a more crowded docket. Although that may be the case, a less crowded docket is not a factor which compels this court to abrogate the "first-filed" rule and go forward in a case which is already before another federal district court.

Midwest argues that the first filed action is a false pleading, seeking payment of withdrawal liability allegedly owed and past due at the time suit was filed, before notice and demand for payment had even been served on Midwest. Midwest further argues that Central States filed an anticipatory premature collection action and therefore, the action should not be deemed first filed.

In those cases that granted the second filed case to take precedence over the first filed case, the compelling circumstances often involved one party misleading another into thinking that no lawsuit would be filed. See *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983). Courts also look more closely at actions for declaratory or injunctive relief than those for

damages. See *Northwest* at 1007. (Declaratory judgment actions "may be more indicative of a preemptive strike than a suit for damages" and merit a closer look.) Other cases involve a second-filed case proceeding farther along than the first-filed and was therefore more proper. *Orthmann v. Apple River Campground*, 765 F.2d 119, 121 (8th Cir. 1985). That is not the case here. It appears that it is possible that Midwest did not know of the Illinois lawsuit before it filed the lawsuit in North Dakota. However, the fact remains that the Illinois lawsuit was filed first, and there is no evidence before the court that Midwest was misled into thinking that Central States would not file a lawsuit.

If this court would continue with this lawsuit while the Illinois court is proceeding with the first-filed case, it would be possible that the two federal courts would issue opposite opinions on the same issue with the same parties. "This totally unnecessary and potentially confusing duplication of judicial effort is precisely what the first-filed rule is calculated to avoid." *Northwest* at 1006.

Central States filed the action first, and the Illinois district court is as able as this one to determine all issues surrounding the controversy, including the appropriateness of filing the complaint before the withdrawal liability was overdue, and the constitutionality of the assessment of liability.

The court finds that there are not compelling circumstances present which require the second-filed case to take precedence over the first action. There appears no "misleading, egregious actions" to compel this court to go forward with the present lawsuit while the Illinois suit is still proceeding.

Based on the foregoing, Central States' motion to transfer venue pursuant to 28 U.S.C. § 1404 is HEREBY GRANTED. (doc. #17). The clerk is directed to forward this file to the eastern division of the northern dis-

trict of Illinois. All other pending motions are HEREBY DENIED, without prejudice. The parties may renew the motions as they deem appropriate in the northern district of Illinois.

Dated this 27th day of July, 1994.

/s/ Dwight C.H. Kautzmann
DWIGHT C.H. KAUTZMANN
United States Magistrate

Case No. A1-94-44

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3328NDBI

MIDWEST MOTOR EXPRESS, INC., *et al.*,
Appellants,

vs.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Appellee.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 22, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals, Eighth Circuit

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3328NDBI

MIDWEST MOTOR EXPRESS, INC., *et al.*,
Appellants,

vs.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Appellee.

Appeal from the United States District Court
for the District of North Dakota

Appellants' motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including 3/11/96. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

February 8, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals, Eighth Circuit

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

94C 2561

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
a pension trust, and HOWARD MCDOUGALL, trustee,
Plaintiffs,

v.

MIDWEST MOTOR EXPRESS, INC.,
a North Dakota corporation,
Defendant.

JURISDICTION AND VENUE

1. This is an action for collection of withdrawal liability, interest, and penalties incurred by an employer as a result of a withdrawal from a multiemployer pension plan.

2. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA") *as amended* by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1001 *et seq.* (1982). This Court has jurisdiction over this action under sections 502(e), 502(f), and 4301(c) of ERISA, 29 U.S.C. §§ 1132(e), 1132(f) and 1451(c).

3. Venue lies in this Court under sections 502(e)(2) and 4301(d) of ERISA, 29 U.S.C. §§ 1132(e)(2) and 1451(d), because the Pension Fund is administered at its principal place of business in Rosemont, Illinois.

PARTIES

4. Plaintiff Pension Fund is multiemployer pension plan within the meaning of sections 3(37) and 4001 (a)(3) of ERISA, 29 U.S.C. §§ 1002(37) and 1301 (a)(3). Plaintiff Howard McDougall is one of the present trustees of the Pension Fund and is a plan fiduciary of the Pension Fund within the meaning of section 4301 (a)(1) of ERISA, 29 U.S.C. § 1451(a)(1). The trustees administer the Pension Fund at 9377 West Higgins Road, Rosemont, Illinois 60018.

5. Pursuant to sections 502(a)(3) and 4301(a)(1) of ERISA, 29 U.S.C. §§ 1132(a)(3) and 1451(a)(1), a plan fiduciary is authorized to bring this action on behalf of the Pension Fund, its participants, and beneficiaries for the purpose of collecting withdrawal liability.

6. Defendant Midwest Motor Express, Inc. ("Midwest") is a North Dakota corporation with its principal place of business located in the State of North Dakota.

COUNT I:

COLLECTION OF WITHDRAWAL LIABILITY

7. Midwest was subject to collective bargaining agreements between itself and various Teamster Local Unions under which Midwest was required to make contributions to the Pension Fund on behalf of certain of its employees.

8. The Pension Fund has determined that on or about August 17, 1991, Midwest permanently ceased its obligation to contribute to the Pension Fund thereby effecting a "complete withdrawal" as defined in section 4203 of ERISA, 29 U.S.C. § 1383.

9. The Pension Fund has determined that Midwest incurred withdrawal liability to the Pension Fund in the amount of $2,546,439.30 as determined under section 4201(b) of ERISA, 29 U.S.C. § 1381(b).

10. By letter dated April 26, 1994, the Pension Fund issued to Midwest a notice and demand for payment of

withdrawal liability in accordance with sections 4202(2) and 4219(b)(1) of ERISA, 29 U.S.C. §§ 1382 and 1399(b)(1). The notice and attached invoice notified Midwest that it was required to discharge its liability in monthly payments of $92,576.65.

11. Midwest has made no withdrawal liability payments to the Pension Fund.

COUNT II:

DECLARATORY AND INJUNCTIVE RELIEF

12. The Pension Fund realleges paragraphs 1 through 10 of the complaint.

13. On or about January 12, 1994, the employees of Midwest voted to decertify their union bargaining unit. The decertification was confirmed by the National Labor Relations Board on April 1, 1994.

14. Following the decertification Midwest was no longer obligated to contribute to the Pension Fund on behalf of its employees under any collective bargaining agreement or duty under applicable labor-management relations law, within the meaning of Section 4212(a) of ERISA, 29 U.S.C. § 1392(a).

15. Following the decertification no labor dispute exists between Midwest and its employees, within the meaning of Section 4218(2) of ERISA, 29 U.S.C. § 1398(2).

WHEREFORE, plaintiffs request the following relief:

(a) A judgment on Count I against defendant Midwest, and on behalf of the plaintiffs, pursuant to section 502(g)(2) of ERISA, 29 U.S.C. § 1132 (g)(2), for—

(1) past due payments of withdrawal liability;

(2) interest at the prime rate per annum on the unpaid withdrawal liability;

(3) an amount equal to the qreater of interest on the unpaid withdrawal liability or liquidated damages of 20% of the unpaid withdrawal liability;

(4) attorney's fees and costs;

(b) An order compelling defendant Midwest to make its future withdrawal liability payments in the amount of $92,576.65 per month in accordance with the payment schedule determined by the Pension Fund;

(c) A declaration under Count 2 that—

(1) defendant Midwest has ceased to have an obligation to contribute to plaintiff Pension Fund within the meaning of sections 4203(a)(1) and 4212(a) of ERISA, 29 U.S.C. §§ 1383(a)(1) and 1392(a);

(2) no labor dispute exists between defendant Midwest and its employees within the meaning of section 4218(2) of ERISA, 29 U.S.C. § 1398(2);

(d) As alternative relief under Count 2—

(1) an order compelling defendant Midwest to initiate arbitration in accordance with section 4221 of ERISA, 29 U.S.C. § 1401, and the rules of the Pension Fund in the event that defendant Midwest wishes to dispute Pension Fund's withdrawal liability assessment;

(2) an injunction against defendant Midwest prohibiting it from initiating any other action or proceeding to dispute the Pension Fund's withdrawal liability assessment.

(e) That this Court retain jurisdiction of this cause pending compliance with its orders; and

(f) For such further or different relief as this Court may deem proper and just.

Respectfully submitted,

/s/ Terence G. Craig
TERENCE G. CRAIG
Attorney for Plaintiffs
Central States, Southeast and
Southwest Areas Pension Fund
9377 West Higgins Road
Des Plaines, Illinois 60017-5123
(708) 518-9800, Ext. 3443

April 26, 1994

APPENDIX G

[Logo]

CENTRAL STATES
SOUTHEAST AND
SOUTHWEST AREAS
PENSION FUND

April 26, 1994 VIA CERTIFIED MAIL
RETURN RECEIPT # P 840 228 594
AND EXPRESS MAIL

Midwest Motor Express, Inc.
5015 Main Avenue, East
Bismarck, ND 58501

RE: NOTICE AND DEMAND FOR PAYMENT OF
WITHDRAWAL LIABILITY MME, INC.
MIDWEST MOTOR EXPRESS, INC.
ASSESSMENT NO.: 4913053-WL940139-01

Gentlemen:

This is a demand for payment of withdrawal liability incurred as a result of a permanent cessation of contributions to Central States, Southeast and Southwest Areas Pension Fund (the "Fund") by the above captioned business on behalf of some, or all, of its bargaining unit employees. This demand is made pursuant to Section 4219 of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1399(b)), and applies equally to all members of any controlled group of trades or businesses, as defined in Section 414(c) of the Internal Revenue Code, of which the above captioned business is a member.

The total amount of such withdrawal liability is $2,546,439.30.

Please make your check payable to Central States, Southeast and Southwest Areas Pension Fund and forward it to the address as follows:

CENTRAL STATES WITHDRAWAL LIABILITY
P. O. Box 71262
Chicago, Illinois 60694

Please write the assessment number on your check.

At your option, the withdrawal liability may be amortized and paid in monthly installments according to the enclosed minimum required payment schedule, or such liability may be paid in a lump sum. No penalty, interest or amortization charges will be applied if payment of the entire withdrawal liability is received by this office on or before June 1, 1994. If you choose the monthly installment option, amortization charges will accrue on the outstanding balance at the annual rates indicated on the enclosed minimum required payment schedule.

Subject to applicable regulations, if any payment of withdrawal liability is not made when due and such payment plus delinquency charges is not made within sixty (60) days after receiving written notice from the Fund of such delinquency, the Fund may require immediate payment of the remaining balance of the withdrawal liability plus delinquency charges accrued from the due date of the first payment which was not timely made.

Enclosed herewith are documents as follows:

1. A copy of the withdrawal liability calculation;
2. A copy of the minimum required payment schedule for the monthly installment option;
3. A copy of the Fund's procedure governing review of any items relating to the determination and calculation of withdrawal liability, the minimum required payment schedule, and the resolution of disputes regarding withdrawal liability.

Sincerely,

/s/ Harry E. Keil
HARRY E. KEIL
Manager, Delinquent Accounts

HEK:SMT:cc-mm
Enclosures

cc: Withdrawal File

PLEASE NOTE: For inquiries relating to the calculation of this assessment contact Gina Alvarez on extension 3097.

For all other inquiries contact Susan M. Tebbens on extension 3608.

[Enclosures Omitted in Printing]